

# **The Search for Mr. Troupe: The Need to Eliminate Comparison Groups in Pregnancy Discrimination Act Cases**

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*The Pregnancy Discrimination Act (PDA) instructs employers and courts that “women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.” Because pregnancy is such a unique condition with no male counterpart, courts constantly struggle to determine which employees are “similar in their ability or inability to work” to pregnant employees. This struggle leads courts to unnaturally distinguish pregnancy from such “related medical conditions” as morning sickness, sciatica, diabetes, or even the need to use the restroom more frequently. If a pregnant worker’s male colleague missed work due to any of these ailments, courts reason, then he would be terminated. Therefore, courts ultimately deny protection against discrimination to pregnant women.*

*This irrational need to find a “comparison” group is not required in Europe. The European Union has recognized that pregnancy is a biological condition unique to women and protects women from termination due to any reason relating to pregnancy or its related medical conditions. The European approach should be adopted by the United States, because the approach more closely aligns with the text and purpose of the PDA and promotes both equality in employment and the procreation of society.*

## **I. INTRODUCTION**

Kimberly<sup>1</sup> is employed as a saleswoman for a large department store. Her three-year employment record with her employer is impeccable, and Kimberly hopes to eventually attain managerial status. She is also three months pregnant. Although she originally planned on working through her pregnancy, Kimberly is plagued by persistent and severe morning sickness, making her early shift difficult to keep. For the remainder of her nine-month pregnancy, Kimberly is forced to either arrive tardy or not arrive to work at all. Her doctor assures her that this severe nausea will dissipate after Kimberly gives birth, and Kimberly will return to her pre-pregnancy work performance.

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<sup>1</sup> Facts largely taken from *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734 (7th Cir. 1994).

Kimberly's employer must decide whether to adjust Kimberly's hours, force Kimberly to use her sick leave, or simply terminate Kimberly for tardiness in violation of company policy. The employer is aware of federal laws protecting pregnant women from discrimination in employment and wishes to avoid any unlawful employment action. After consulting counsel, the employer concludes that a fair and just course of action is to treat Kimberly the same as other "similarly situated" employees of the company. For the employer's purposes of applying leave and other employment policies, which employee does Kimberly resemble the most:

Pat, an employee with a malfunctioning kidney, who requested (at minimum) a three-month leave of absence for a kidney transplant (with the possibility that the three-month leave could be extended indefinitely depending on her post-operative condition)?

Chris, an employee suffering from a sprained ankle after falling off a ladder while attempting home repairs, who requested (but was denied) light duty employment but must exhaust sick leave or face unpaid leave?

Jamie, an employee injured on the job as a result of a malfunctioning machine press, who received modified duty assignments and workers' compensation payments?

Devon, an employee permanently impaired from a car accident, who received modified duty assignments as a result of the protections of the Americans with Disabilities Act?

The answer is none of the above. None of the employees closely resemble Kimberly's physiological condition of pregnancy. Because pregnancy is not a disease, Kimberly's pregnancy is not comparable to Pat's kidney disorder; likewise, pregnancy is not an injury, similar to those suffered by Chris and Jamie. While pregnancy may be temporarily impairing, it is not sufficiently impairing to qualify as a long-term disability under the Americans with Disabilities Act.<sup>2</sup> Thus, Kimberly's pregnancy bears no resemblance to Devon's permanent disability.

While the difficulty of finding a satisfactory answer seems obvious, courts routinely engage in this futile exercise when faced with Pregnancy Discrimination Act (PDA) claims.<sup>3</sup> The PDA instructs employers and courts that "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ."<sup>4</sup> Because pregnancy is such a unique condition with no male counterpart, courts constantly struggle with which employees are "similar [to pregnant employees] in their ability or inability to work." The Federal Circuits differ substantially in their approaches, and the

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<sup>2</sup> Americans with Disabilities Act, 42 U.S.C. § 12111-12117 (2000).

<sup>3</sup> Pregnancy Discrimination Act, 42 U.S.C. § 2000(e)(k) (2000).

<sup>4</sup> *Id.*

United States Supreme Court has yet to identify a class of employees similarly situated to pregnant workers.

Across the Atlantic Ocean, legal scholars and legislators realized the difficulty in comparing pregnant employees with their nonpregnant counterparts. To prevent women from suffering adverse employment consequences when choosing to have both a child and a career, the European Community established that pregnancy is "unique to women's biological and cultural experiences."<sup>5</sup> Therefore, any action taken by an employer because of an employee's pregnancy or a related condition is *prima facie* discrimination.<sup>6</sup>

This Note will examine the current interpretations of the Pregnancy Discrimination Act and the standard of comparison used by courts to determine who is "similarly situated" with pregnant employees. Part II.A. reviews the brief but varied history of the Pregnancy Discrimination Act and its current scope. Part II.B. highlights the approaches most courts use in determining the proper comparator group; the flaws in these approaches are discussed in Part II.C. Part III explains the European standard and why this approach is one that should be considered in the United States.

## II. THE CURRENT SCOPE OF THE PREGNANCY DISCRIMINATION ACT

### A. History of the PDA

To gain an understanding of the protection extended by the current interpretation of the PDA, it is helpful to first look at the brief history of pregnancy discrimination protection. The protection afforded to pregnancy discrimination was built from the ground up. Pregnant women were not explicitly a protected class under the 1964 Civil Rights Act, and originally, the United States Supreme Court declined to extend Title VII's umbrella to prohibit discrimination on the basis of pregnancy. In its 1976 decision in *General Electric Co. v. Gilbert*,<sup>7</sup> the Court held that pregnancy did not fall within the auspice of gender for the purposes of Title VII protection.<sup>8</sup> While pregnancy affects only women, the Court reasoned, nonpregnant persons can be both male and female.<sup>9</sup>

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<sup>5</sup> Ursula R. Kubal, *U.S. Multinational Corporations Abroad: A Comparative Perspective on Sex Discrimination Law in the United States and the European Union*, 25 N.C. J. INT'L L. & COM. REG. 207, 259 (1999).

<sup>6</sup> *Id.* at 255.

<sup>7</sup> *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

<sup>8</sup> *Id.* at 135. The issue in *Gilbert* was whether an employee disability benefits plan that protected absences due to sickness and accidents, but not pregnancy, constituted gender discrimination in violation of Title VII. *Id.* at 127-28.

<sup>9</sup> *Id.* at 135.

Congress disagreed with the outcome in *Gilbert*, and subsequently enacted what is commonly known as the Pregnancy Discrimination Act.<sup>10</sup> The PDA is an amendment to Title VII, which states:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . .<sup>11</sup>

Thus, the PDA has two distinct clauses. The first clause includes pregnancy, childbirth, and related medical conditions under Title VII's definition of "because of sex." The second clause states that employers must treat pregnant employees exactly the same as nonpregnant employees comparable in their work abilities.

There is substantial confusion over how the two clauses are to be interpreted. The prevailing view requires an understanding of the general Title VII approaches to proving intentional discrimination (also known as "disparate treatment" discrimination).<sup>12</sup> Disparate treatment discrimination is proven by either using direct evidence of intent to discriminate or using indirect evidence from which a court could infer intent to discriminate.<sup>13</sup> A plaintiff choosing the indirect evidence route must satisfy the test set forth by the U.S. Supreme Court in *McDonnell Douglas v. Green*.<sup>14</sup> The test consists of four requirements. Specifically, a plaintiff must demonstrate the following: (1) he is a member of a protected class; (2) he suffered an adverse employment action; (3) he is qualified

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<sup>10</sup> 42 U.S.C. 2000(e)(k) (2000).

<sup>11</sup> *Id.*

<sup>12</sup> As part of a protected class under Title VII, pregnancy discrimination plaintiffs may also bring disparate impact claims against their employers. Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000(e)(2)(k)(1)(A) (2000). Disparate impact occurs when a facially-neutral business practice adversely impacts members of a protected group. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (finding that the employer's facility-neutral requirement that all applicants possess a high school diploma is nonetheless racially discriminatory). In order to establish disparate impact, plaintiffs must statistically demonstrate that the employer's policy had a significant adverse effect on the protected group. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (holding that the plaintiff must show substantial statistical disparities between the treatment of the protected class and the treatment of all other applicants). PDA claims are typically disparate treatment claims, as most pregnant plaintiffs find it difficult to successfully demonstrate a statistical disparity. *See Maganuco v. Leyden Cmty. High Sch. Dist.* 212, 939 F.2d 440 (7th Cir. 1991) (denying teacher's pregnancy discrimination claim due to insufficient statistical evidence). *But cf. Garcia v. Women's Hosp. of Texas*, 97 F.3d 810 (5th Cir. 1996) (finding that a disparate impact need not be demonstrated by statistical data if the plaintiff can prove that substantially all pregnant women would have been adversely affected by the employer's lifting requirement).

<sup>13</sup> *McDonnell Douglas v. Green*, 411 U.S. 792, 802-04 (1973).

<sup>14</sup> *Id.*

for the position; and (4) the position remained open, or was filled by someone outside of the protected class.<sup>15</sup> Once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the adverse employment action.<sup>16</sup>

When applied to pregnancy discrimination cases, the *McDonnell Douglas* framework incorporates the second clause of the PDA by altering the fourth requirement of the prima facie case. Rather than proving that she was replaced with a non-member of her protected class, a PDA plaintiff asserts "that others similarly situated were more favorably treated."<sup>17</sup> In order for the court to determine whether a plaintiff has satisfactorily demonstrated the fourth prong of a prima facie case of pregnancy discrimination, the court must decide which employees are similarly situated to pregnant women for the purposes of determining whether the employer acted in a discriminatory manner. The answer to that question, as this Note will illustrate, can drastically alter the protection and scope of the PDA.<sup>18</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998). As the Tenth Circuit Court of Appeals noted in *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1194 (10th Cir. 2000), the plaintiff can establish the fourth prong of the McDonnell Douglas test in a number of ways, so long as the entire prima facie case raises a rebuttable presumption that the defendant unlawfully discriminated against the plaintiff. *See id.* at 1191. Other courts may phrase the fourth prong differently in PDA cases, or add the similarly-situated language as an alternative to the traditional fourth prong of a prima facie case. *See Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1224 (6th Cir. 1996) (after listing the traditional four prongs of a prima facie case, noting that, in addition to the first three requirements of a prima facie case, a plaintiff "may also establish a prima facie case by showing . . . that 'a comparable non-protected person was treated better.'") (citation omitted).

<sup>18</sup> While this interpretation of the second clause of the PDA is most common, other courts have read the two clauses of the PDA differently. In *Crnokrak v. Evangelical Health Sys. Corp.*, 819 F. Supp. 737 (N.D. Ill. 1993), the court reasoned that the first clause of the PDA creates a claim for disparate treatment pregnancy discrimination, while the second clause creates a cause of action for disparate impact pregnancy discrimination. *See id.* at 741-42. Because "short-term inability to work is a medical condition virtually inherent in pregnancy and childbirth," the first clause expressly prohibits discrimination based on short-term inability to work by including "related medical conditions" in the definition of "because of sex." *Id.* at 741. If the second clause were read to "infer that disability leave policies are immune from attack under Title VII if they treat all disabilities identically," then the second clause of the PDA would prohibit disparate impact pregnancy discrimination claims (by denying plaintiffs the opportunity to challenge disability leave policies that may be facially neutral towards pregnancy, but have adverse effects on pregnant women). Instead, the court found that Congress enacted the PDA with the acknowledgement that "equality cannot be achieved by treating identically those who are not alike," and therefore the second clause preserves the disparate impact cause of action while setting a floor below which employers may not fall. *Id.* at 742 (citation omitted).

## B. *The Current Comparator Groups*

### 1. *The Troupe Standard: Similarly Situated in Cost*

When determining the similarly situated group in PDA cases, courts often rely on Judge Richard Posner's logic in his opinion in *Troupe v. May Department Stores Co.*<sup>19</sup> During her pregnancy, plaintiff Kimberly Troupe worked as a saleswoman in a Lord & Taylor department store.<sup>20</sup> Ms. Troupe experienced frequent bouts of morning sickness, causing her to be tardy for her early morning shifts.<sup>21</sup> As a result of her repeated tardiness, Ms. Troupe's boss placed Ms. Troupe on probation.<sup>22</sup> Ms. Troupe's morning sickness, however, failed to subside, causing Ms. Troupe to arrive late eleven times during her probationary period.<sup>23</sup> On Ms. Troupe's last day of work before her scheduled maternity leave, Lord & Taylor notified the plaintiff that she was not welcome to return to work after the commencement of her maternity leave.<sup>24</sup>

The Seventh Circuit Court of Appeals held that Ms. Troupe's termination was not an act of pregnancy discrimination.<sup>25</sup> The scope of the Pregnancy Discrimination Act's protection only required employers to "ignore an employee's pregnancy, but . . . not her absence from work, unless the employer overlooks the comparable absences of nonpregnant employees."<sup>26</sup> Because Ms. Troupe failed to introduce evidence of a similarly situated group of employees, the court hypothesized about what actions Lord & Taylor would have taken with a fictional Mr. Troupe, who, because of health problems, is "about to take a protracted sick leave growing out of those [health] problems at an expense to Lord & Taylor equal to that of Ms. Troupe's maternity leave."<sup>27</sup> According to the

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<sup>19</sup> *Troupe v. May Dep't Stores Co.*, 20 F.3d 734 (7th Cir. 1994).

<sup>20</sup> *Id.* at 735.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 736. Legal analysts often criticize the result of the *Troupe* case on the grounds that Judge Posner's decision was influenced by the stereotype that Ms. Troupe would not return to the workforce after exhausting her maternity leave. For further discussion of this theory, see Ann C. McGinley & Jeffrey W. Stempel, *Condescending Contradictions: Richard Posner's Pragmatism and Pregnancy Discrimination*, 46 FLA. L. REV. 193 (1994).

<sup>25</sup> *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736-39 (7th Cir. 1994).

<sup>26</sup> *Id.* at 738.

<sup>27</sup> *Id.* The court also compared Ms. Troupe to the following:

Jones, a black employee scheduled to take a three-month paid sick leave for a kidney transplant. . . . [T]he company fired him. In doing so . . . the company could not be found guilty of racial discrimination unless . . . there was evidence that it failed to exhibit comparable rapacity toward similarly situated employees of the white race.

court, Lord & Taylor would have also fired hypothetical Mr. Troupe, since both employees "cost the company more than [they] are worth to it."<sup>28</sup>

The Seventh Circuit's interpretation of employees "similar[ly] situated in their ability to work" requires that the employees are similarly situated not in *ability*, but only in loss of productivity. By comparing Ms. Troupe's absenteeism to a hypothetical man who shares no similarities with Ms. Troupe aside from his need for medical leave, the court uses the cost of an employee to the employer as its only measure of who is "similarly situated." The message to pregnant employees is that pregnancy is perfectly acceptable, so long as their productivity does not suffer.<sup>29</sup> This standard seems somewhat unreasonable given the physical demands of even the most typical pregnancies.

## 2. The Fifth and Eleventh Circuit Standard: Similarly Situated in Source of Injury or Illness

*Troupe* was decided before the enactment of the Americans with Disabilities Act (ADA),<sup>30</sup> as well as the advent of modern workers' compensation legislation.<sup>31</sup> Both areas of legislation require employers, in some circumstances, to accommodate and compensate employees suffering from disabilities and work-related injuries or illnesses.<sup>32</sup> The *Troupe* comparison standard faced some ambiguity and confusion in light of this subsequent legislation, as not all employees limited in their ability to work cost the same to the employer. Courts were presented with the problems of whether pregnancy is a disability<sup>33</sup> and whether pregnancy should be treated the same as on-the-job injuries.

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*Id.*

<sup>28</sup> *Id.* at 738.

<sup>29</sup> See, e.g., Julie Manning Magid, *Pregnant with Possibility: Reexamining the Pregnancy Discrimination Act*, 38 AM. BUS. L.J. 819, 826 (2001) ("[O]nly those women who experience no illness, no changing biological requirements, and require no time to give birth to their child or recover from giving birth are protected by the PDA.").

<sup>30</sup> See Americans with Disabilities Act, 42 U.S.C. § 12111-12117 (2000).

<sup>31</sup> See, e.g., OHIO REV. CODE ANN. § 4123 et. seq. (West 2001).

<sup>32</sup> Ohio's workers' compensation, for example, is only available to "[e]very employee, who is injured or who contracts an occupation disease ... contracted in the course of employment." OHIO REV. CODE ANN. § 4123.54(A) (West 2001).

<sup>33</sup> The EEOC's opinion is that pregnancy is not an impairment, and is too temporary to qualify as a disability under the ADA. 29 C.F.R. pt. 1630 app. § 1630.2(h). However, disabilities resulting from pregnancy—such as diabetes—could be a protected disability under the ADA. See 29 C.F.R. § 1604.10(b) ("Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions."). For arguments that pregnancy should be accommodated as a disability see Ruth Colker, *Pregnancy, Parenting, and Capitalism*, 58 OHIO ST. L.J. 61 (1997); Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1 (1995).

Two cases settling the latter issue in the Fifth and Eleventh Circuits are *Urbano v. Continental Airlines, Inc.*<sup>34</sup> and *Spivey v. Beverly Enterprises, Inc.*<sup>35</sup> In *Urbano*, plaintiff Mirtha Urbano worked as a Ticketing Sales Agent for Continental Airlines.<sup>36</sup> A few weeks into her pregnancy, she began having back pains and sought medical advice.<sup>37</sup> Ms. Urbano's doctor restricted her from lifting anything above twenty pounds.<sup>38</sup> Similarly, in *Spivey*, plaintiff Michelle Spivey—a nurse's assistant at a rehabilitation center—was placed on a lifting restriction shortly after discovering she was pregnant.<sup>39</sup> The restriction prohibited her from lifting anything greater than twenty-five pounds.<sup>40</sup> Both women submitted requests to their respective employers for modified job duties consistent with their doctor-prescribed limitations.<sup>41</sup>

However, both women were denied their request for light duty work.<sup>42</sup> The two employers had similar policies, which only granted modified or light duty assignments to employees with work-related injuries or illnesses.<sup>43</sup> The plaintiffs subsequently challenged their ineligibility to receive modified assignments under the PDA, arguing that employees with occupational injuries were similarly situated to themselves, because both groups were limited by lifting restrictions. Therefore, the plaintiffs argued, the denial of modified work for plaintiffs violated the second clause of the PDA.

In *Urbano*, which was the first of the two cases to be decided, the Fifth Circuit Court of Appeals rejected Ms. Urbano's argument that she was similarly situated with employees suffering work-related injuries. The correct comparison group, according to the court, was nonpregnant employees injured off of the job.<sup>44</sup> Furthermore, the court found that accepting Ms. Urbano's argument would require employers to provide preferential treatment to pregnant women by

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<sup>34</sup> *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204 (5th Cir. 1998).

<sup>35</sup> *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309 (11th Cir. 1999).

<sup>36</sup> *Urbano*, 138 F.3d at 205.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* The *Urbano* and *Spivey* cases illustrate the difficult choices pregnant women must make when complying with their job requirements actually places their unborn children and themselves at risk of physical harm. Taxing work conditions imposed on pregnant women, such as heavy lifting and prolonged standing, could result in high blood pressure in the mother, as well as premature or underdeveloped babies. *Obstetrics: New Study Details Link Between Working Conditions and Problem Pregnancies*, WOMEN'S HEALTH WEEKLY, 22 Apr. 2000, at 8.

<sup>39</sup> *Spivey*, 196 F.3d at 1311.

<sup>40</sup> *Id.*

<sup>41</sup> *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 205 (5th Cir. 1998); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1311 (11th Cir. 1999).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Urbano*, 138 F.3d at 206.



accommodating pregnancy but denying similar treatment to “employees with a similar medical need whose conditions arose off-the-job.”<sup>45</sup> To do so would “not [be] permissible under Title VII, for such a policy would treat a male employee ‘in a manner which but for that person’s sex would be different.’”<sup>46</sup>

The *Spivey* decision closely followed the logic used in deciding *Urbano*. The court reasoned that the PDA requires employers to “ignore an employee’s pregnancy and treat her ‘as well as it would have if she were not pregnant.’”<sup>47</sup> Therefore, the employer properly ignored Ms. Spivey’s pregnancy, leaving the employer “with an employee who suffered from a non-occupational injury.”<sup>48</sup>

### 3. *The Ensley-Gaines Standard: Similarly Situated in Ability*

The Sixth Circuit took a different approach to the same question presented in *Urbano* and *Spivey*. In *Ensley-Gaines v. Runyon*,<sup>49</sup> plaintiff Kim Ensley-Gaines was employed for the United States Postal Service as a full-time mailhandler.<sup>50</sup> Her job frequently required lifting trays of mail and forced her to be on her feet for up to eight hours at a time.<sup>51</sup>

All of the employees at the facility were members of a union and, therefore, subject to a Collective Bargaining Agreement (CBA).<sup>52</sup> The CBA governing Ms. Ensley-Gaines’ union provided that, in the event of an off-duty injury or illness, members were allowed to submit requests for light duty work.<sup>53</sup> The employer was not required to guarantee the availability of light duty work, but the employer had to “show the greatest consideration for . . . employees requiring light duty or other assignments, giving each request careful attention, and reassign such employees to the extent possible in the employee’s office.”<sup>54</sup>

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<sup>45</sup> *Id.* at 208.

<sup>46</sup> *Id.* at 208 n.2 (citation omitted). *Cf.* California Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 285 (1987) (“Congress intended the PDA to be ‘a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise’.”) (citation omitted).

<sup>47</sup> *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1313 (11th Cir. 1999) (citation omitted).

<sup>48</sup> *Id.*

<sup>49</sup> *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996).

<sup>50</sup> *Id.* at 1222.

<sup>51</sup> *Id.* at 1222–23.

<sup>52</sup> *Id.* at 1222.

<sup>53</sup> *Id.* In pertinent part, the CBA provided “[a]ny full-time regular or part-time flexible employee recuperating from a serious illness or injury and temporarily unable to perform the assigned duties may voluntarily submit a written request to the installation head for temporary assignment to a light duty or other assignment.” *Id.* at n.2.

<sup>54</sup> *Id.* at 1222.

The Post Office was further required, under the Federal Employee Compensation Act (FECA), to compensate employees injured on the job.<sup>55</sup> Postal Service employees injured on the job were classified as "limited-duty" employees.<sup>56</sup> Because FECA mandated compensation of limited-duty employees regardless of hours worked, "every effort" was made by the Postal Service to secure hours and accommodation for limited-duty employees.<sup>57</sup>

Ms. Ensley-Gaines applied for light duty work after her doctor imposed a lifting restriction of fifteen pounds and a standing restriction of four hours for the duration of her pregnancy.<sup>58</sup> She was only given four hours of standing work a day, and she was not permitted to earn additional hours by staying for a complete eight-hour day while finishing her tasks sitting down.<sup>59</sup>

In arguing her pregnancy discrimination claim, Ms. Ensley-Gaines cited the seemingly favorable treatment received by other employees, many of whom faced similar lifting and standing restrictions.<sup>60</sup> Another light duty employee, injured off of the job, had an identical lifting restriction and an even greater standing restriction.<sup>61</sup> He was given sitting work for fifteen percent of his working time.<sup>62</sup> Several limited-duty employees, injured on the job, were given full-time limited-duty work.<sup>63</sup> Finally, several employees facing no medical restrictions were sporadically permitted to sit in chairs while sorting the mail.<sup>64</sup> Ms. Ensley-Gaines asserted that she should be treated the same as those guaranteed limited-duty work, since the PDA standard required employers to offer the same treatment to those "similarly situated in their ability to work."<sup>65</sup> The employer countered that because Ms. Ensley-Gaines was not injured at work, she was not protected by the scope of FECA and, therefore, not similarly situated with limited-duty employees.<sup>66</sup>

The court agreed with Ms. Ensley-Gaines, finding that, rather than being similarly situated in all respects, an employee must be similar in his or her "ability

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<sup>55</sup> Ensley-Gaines v. Runyon, 100 F.3d 1220, 1222 (6th Cir. 1996). See also Federal Employee Compensation Act, 5 U.S.C. §§ 8101-8193 (2000).

<sup>56</sup> Ensley-Gaines v. Runyon, 100 F.3d 1220, 1222 (6th Cir. 1996).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1222-23.

<sup>59</sup> *Id.* at 1223.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1223.

<sup>62</sup> Ensley-Gaines v. Runyon, 100 F.3d 1220, 1223 n.5 (6th Cir. 1996). Ms. Ensley-Gaines only received sitting work for five percent of her total on-duty time. *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1226 (quoting 42 U.S.C. § 2000(e)(k)(2003)).

<sup>66</sup> *Id.* (citation omitted).

or inability to work.”<sup>67</sup> The mandatory compensation of employees injured while working was irrelevant for the purposes of comparison under the PDA; the court reasoned that FECA was a “term[] of employment” that does not pertain to an employee’s ability or inability to work.<sup>68</sup> Therefore, the source of the employees’ injuries or illnesses is irrelevant to the comparison of two employees in their ability to perform at work and their subsequent treatment by the employer.<sup>69</sup>

### C. Criticism of the Current Comparator Groups

#### 1. Current Comparator Groups Fail to Give Effect to the Entire Statute

The Pregnancy Discrimination Act states that “the term[] ‘because of sex’ includes . . . because of or on the basis of pregnancy, childbirth or *related medical conditions*; and women affected by pregnancy, childbirth, or *related medical conditions* shall be treated the same for all employment-related purposes.”<sup>70</sup> A reasonable reading of the statute would prohibit employers from basing employment decisions on medical conditions related to and caused by pregnancy.<sup>71</sup> Modern interpretation of the statute, however, does not recognize or give effect to the term “related medical conditions” so long as the medical conditions have unfavorable effects on an employee’s productivity.<sup>72</sup>

The logic used in *Troupe* provides protection to pregnant employees only to the extent that the pregnancy does not create any complications with an employee’s work schedule. Likewise, the standard of comparison advanced by the Fifth and Eleventh Circuits also treats pregnancy as an immutable characteristic with no potential effects or interference with productivity. As in *Troupe*, these courts interpret the PDA to provide protection to pregnant employees as long as pregnancy does not interfere with an employee’s performance at work. Both approaches ignore the fact that, unlike other characteristics protected by Title VII, pregnancy manifests in a variety of health

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<sup>67</sup> *Id.*

<sup>68</sup> *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996).

<sup>69</sup> The Tenth Circuit subsequently followed the Sixth Circuit’s *Ensley-Gaines* approach. See *E.E.O.C. v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1194–95 (10th Cir. 2000) (accepting the defendant’s argument that the “charging parties must be compared to nonpregnant employees who were temporarily disabled as a result of an injury each suffered off the job”).

<sup>70</sup> 42 U.S.C. § 2000(e)(k) (2003) (emphasis added).

<sup>71</sup> See, e.g., *Crnokrak v. Evangelical Health Sys. Corp.*, 819 F. Supp. 737, 741 (N.D. Ill. 1993) (“Because short-term inability to work is a medical condition virtually inherent in pregnancy and childbirth, the first clause could be construed as barring discrimination against employees who are temporarily absent from work for medical reasons related to pregnancy and childbirth.”).

<sup>72</sup> See *infra* Part II.B.

complications and medical conditions, a few of which potentially conflict with an employee's obligations.

Some courts have acknowledged that pregnancy is often accompanied by related medical conditions, and that related medical conditions should be afforded protection by the PDA. In *Moawad v. Rx Place*,<sup>73</sup> the District Court for the Eastern District of New York found that, if the plaintiff could prove that her medical conditions were pregnancy-induced, plaintiff's leg pain and sciatica were conditions covered under the PDA.<sup>74</sup> Even the *Troupe* opinion noted that morning sickness was a medical condition related to pregnancy.<sup>75</sup>

Despite the recognition that related medical conditions are included within the scope of protection of the PDA, courts unnaturally divorce the medical conditions caused by pregnancy from their inevitable interruption of an employee's performance. One court empathized with the pregnant plaintiff by stating that "[p]regnancy causes normal inconveniences that might 'interrupt the workplace's daily routines,' including, for example, the need to take more frequent snack and restroom breaks and the need to take some time off, at the very least, to give birth."<sup>76</sup> The same court even rejected the notion that the PDA creates an "artificial divide" between pregnancy and its medical effects.<sup>77</sup>

Yet that court failed to extend PDA protection to tangential medical conditions of pregnancy. Instead, it instructed employers to anticipate the potential work conflicts of an employee's pregnancy and, on a "good faith" basis,

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<sup>73</sup> *Moawad v. Rx Place*, 1999 U.S. Dist. LEXIS 7969 (E.D.N.Y. 1999).

<sup>74</sup> *Id.* at 18. The court's opinion reaches a confusing conclusion. The plaintiff originally requested accommodations in her job to deal with the pain caused by the sciatica; after the employer rejected the request, plaintiff instead requested long term disability leave. *Id.* at 7. She was subsequently terminated. *Id.* at 8. The court recognized that the plaintiff's sciatica was a medical condition relating to pregnancy, and therefore a condition protected by the PDA. The court established that the employer's subsequent duty under the PDA was to "allow plaintiff to take disability/maternity leave." *Id.* at 19. The court then proceeded to find plaintiff's termination was lawful because the employer terminated all employees taking such long absences. *Id.* at 21. The bizarre result is that plaintiff is entitled to take a long-term leave, but the employer is equally entitled to terminate her if she takes that leave.

<sup>75</sup> *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994) ("We do not know whether Lord & Taylor was less tolerant of Troupe's tardiness than it would have been had the cause not been a *medical condition related to pregnancy*." (emphasis added)). In defining the scope of the term "conditions related to pregnancy or childbirth," the court in *McNill v. New York City Dep't of Corr.*, 950 F. Supp. 564 (S.D.N.Y. 1996) described the term as encompassing conditions "ordinarily . . . treated by an obstetrician or a gynecologist." *Id.* at 570.

<sup>76</sup> *Maldonado v. U.S. Bank*, 186 F.3d 759, 767 (7th Cir. 1999) (citation omitted).

<sup>77</sup> *Id.*

take appropriate action to avoid such conflicts.<sup>78</sup> In other words, employers may take anticipatory adverse action if they have a good faith reason to believe an employee's pregnancy will cause "potential conflicts" with her work schedule.

Some courts have expressed frustration at the inherent unfairness of providing PDA protection for medical conditions related to pregnancy while denying protection to absences or work interruptions created by the "protected" medical conditions. In *Davidson v. Franciscan Health System of the Ohio Valley, Inc.*,<sup>79</sup> the plaintiff was terminated for exceeding the twenty-six weeks of medical leave afforded by the employer.<sup>80</sup> Because the plaintiff was pregnant with triplets and endured a high-risk pregnancy, she exhausted her leave while still pregnant and on bed rest.<sup>81</sup> The court, in dicta, denounced the logic behind current PDA interpretations:

Defendant's neutral reason for terminating the Plaintiff, that she exceeded her medical leave, barely masks the underlying reason for why the Plaintiff took medical leave in the first place. It is a strange twist in the law that the PDA cannot protect a pregnant woman, who is otherwise an excellent employee, from being terminated from her position while she is pregnant, and taking a leave of absence because of that pregnancy.<sup>82</sup>

Nonetheless, the court dismissed the plaintiff's claim, because "[t]he case law and the statute are clear—the PDA does not require that employers treat pregnant employees more favorably."<sup>83</sup>

The irrationality of using comparator groups to justify adverse employment decisions based on absences caused by pregnancy is eloquently expressed in the dissenting opinion in *In re Carnegie*.<sup>84</sup> In an assault on the *Troupe* opinion, on which the majority in *Carnegie* relies, the dissent stresses that the infamous "Mr. Troupe" analogy is flawed because absence from work is a trait endemic to pregnancy, childbirth, and related medical conditions.<sup>85</sup> Absence from work is not a trait associated with any other protected class.<sup>86</sup> Therefore, the dissent reasons, "the court in *Troupe* misses the analytical mark when it states that

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<sup>78</sup> *Id.* ("[A]n employer cannot take anticipatory action unless it has a good faith basis, supported by sufficiently strong evidence, that the normal inconveniences of an employee's pregnancy will require special treatment.").

<sup>79</sup> *Davidson v. Franciscan Health Sys. of the Ohio Valley, Inc.*, 82 F. Supp. 2d 768 (S.D. Ohio 2000).

<sup>80</sup> *Id.* at 770.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 774.

<sup>83</sup> *Id.*

<sup>84</sup> *In re Carnegie Ctr. Assocs.*, 129 F.3d 290, 305 (3d Cir. 1997) (McKee, J., dissenting).

<sup>85</sup> *Id.* at 305.

<sup>86</sup> *Id.*

'employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees' unless it defines 'similarly affected' employees as other employees having a protected trait that is endemic to the behavior at issue."<sup>87</sup> That is, pregnancy cannot occur without some disruption in work; therefore, in order to evaluate whether an employer's behavior was discriminatory, the treatment of the pregnant employee must be compared with the treatment of a group of employees similarly affected by the disruptive trait.

The dissent's argument is bolstered by logic used in the U.S. Supreme Court's opinion in *Hazen Paper Company v. Biggins*.<sup>88</sup> In *Hazen*, the issue was whether it constituted unlawful age discrimination under the Age Discrimination in Employment Act (ADEA) to terminate an employee shortly before the vesting of the employee's pension plan.<sup>89</sup> Although the Court held that the termination did not violate the ADEA because the termination was justified by a factor "analytically distinct" from age,<sup>90</sup> the Court conceded that there might be circumstances in which age is a "proxy for an employee's remaining characteristics."<sup>91</sup> Use of these characteristics as a proxy for age has the potential to constitute discrimination.<sup>92</sup> The *Carnegie* dissent argued that pregnancy is not analytically distinct from absence from work—an employer cannot ignore an employee's pregnancy when taking into account the employee's absence because of pregnancy.<sup>93</sup> Absence caused by pregnancy-related medical conditions and pregnancy itself is simply a proxy for pregnancy. Therefore, the language of the PDA should protect absence endemic to pregnancy.

In order to give effect to the entire statute, employers should be prevented from using any symptom of pregnancy—and its inevitable interferences with employment—as a lawful reason for termination. By stressing the comparative nature of pregnancy discrimination, employers are free to dismiss pregnant employees for any interruptions in their productivity, so long as other employees would likely be dismissed for absences or interruptions of equal length.

## 2. Current Comparator Groups Do Not Promote the Purpose of the PDA

By comparing pregnant employees with nonpregnant employees, employers have little incentive to provide any accommodations to pregnant employees requesting light-duty or modified assignments. Therefore, women are forced to

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<sup>87</sup> *Id.* (citation omitted).

<sup>88</sup> *Id.* at 306 (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 608 (1993)).

<sup>89</sup> *Hazen Paper Co.*, 507 U.S. at 608.

<sup>90</sup> *Id.* at 609. The Court defined an "analytically distinct" factor as one which "an employer can take account of one while ignoring the other." *Id.* at 611.

<sup>91</sup> *Id.* at 611.

<sup>92</sup> *Id.*

<sup>93</sup> *In re Carnegie Ctr. Assoc.*, 129 F.3d 290, 306 (3d Cir. 1997) (McKee, J., dissenting).

choose between risking the health and safety of their unborn children by continuing to work, or losing their employment and income.<sup>94</sup>

The legislative history of the PDA indicates that the drafters intended to eliminate the choice between work and family that confronted female employees. The drafters made this intention clear in no uncertain terms: "Title VII and the PDA are designed to 'put an end to an unrealistic and unfair system that forces women to choose between family and career'."<sup>95</sup> This purpose is also reflected in a statement made by Senator Williams, a sponsor of the PDA, who indicated that the "entire thrust" of the PDA is "to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."<sup>96</sup> By failing to recognize pregnancy as a unique biological condition, and comparing pregnancy to injury and illness, employers force pregnant employees to make the same choice between bearing children and maintaining a career that the PDA was meant to eradicate.<sup>97</sup>

Furthermore, the legislative history of the PDA often embraces the basic idea that pregnancy is a condition unique to women. Senator Javits stated that "it seems only commonsense, that since *only women can become pregnant*, discrimination against pregnant people is necessarily discrimination against women."<sup>98</sup> While Senator Javits' comment explains why pregnancy should be encompassed by the term "because of sex," his statement also implies that drafters appreciated the unique burden pregnancy imposes on females which is not equally shared by males.

The idea that pregnancy is a unique condition unparalleled by any other circumstance is also reflected in comments made by the judiciary. Justice Stevens' dissent in *Gilbert* noted that it is the capacity to "become pregnant which primarily differentiates the female from the male."<sup>99</sup> More recently, in rejecting the idea that infertility was a medical condition related to pregnancy, the Court of Appeals for the Second Circuit held that "for a condition to fall within the PDA's

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<sup>94</sup> See *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1311 (11th Cir. 1999).

<sup>95</sup> 124 CONG. REC. 21442 (daily ed. July 18, 1978) (statement of Rep. Tsongas); see also *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, n.19 (1987).

<sup>96</sup> 123 CONG. REC. 29658 (daily ed. Sept. 16, 1977) (statement of Sen. Williams); see also *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

<sup>97</sup> I am not referring to the choice of the woman to leave the workforce for child-rearing purposes. Instead, I am limiting my argument to the choice facing women to leave the workforce for child-bearing purposes. For a discussion of whether leave taken after the birth for child-rearing purposes should be protected by the PDA, see Joan C. Williams and Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003).

<sup>98</sup> 123 CONG. REC. 29387 (daily ed. Sept. 16, 1977) (statement of Sen. Javits) (emphasis added); see also *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

<sup>99</sup> *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 162 (1976) (Stevens, J., dissenting).

inclusion . . . as sex-based characteristics, that condition must be *unique to women*.”<sup>100</sup> This holding creates a conundrum for PDA plaintiffs: to trigger the protection of the PDA, the plaintiff must suffer a condition susceptible only by females; however, to determine whether the plaintiff was discriminated against because of her unique biological condition, courts attempt to compare her condition with the “similar” biological conditions in men and women.

### 3. *Current Comparator Groups Fail to Represent Our Societal Value of Procreation*

The logic in *Spivey*, *Urbano*, and *Ensley-Gaines* warrants concern for its reflection of our cultural and societal values. Should an employer place the same value on pregnancy as it does on an injury—regardless of whether the injury occurred on or off the job? Presumably, accidents and injuries should be discouraged to the extent that they are a result of carelessness and bad judgment. Should the same value also apply to pregnancy?

The nonsensical nature of applying the same logic to pregnancy as is afforded to off-work accidents is illustrated by the dicta in *Troupe*. The court stressed that *Troupe*’s termination was just as much a deterrent measure by the employer as a remedial measure: “[i]f the company did not fire [Troupe], its warnings and threats would seem empty. Employees would be encouraged to flout work rules knowing that the only sanction would be a toothless warning or a meaningless period of probation.”<sup>101</sup> The idea that absences due to morning sickness are an attempt to “flout work rules” implies pregnancy and its related complications are anti-social behavior conducted intentionally out of disrespect to employers. This approach places a negative societal value on pregnancy by insinuating that pregnant women are social misfits.<sup>102</sup>

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<sup>100</sup> *Saks v. Franklin Covey Co.*, 316 F.3d 337, 346 (2d Cir. 2003) (emphasis added).

<sup>101</sup> *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994).

<sup>102</sup> One scholar noted another societal problem created by comparing pregnancy to illness and disease. The comparative emphasis placed on PDA cases causes people to think of pregnancy as an illness, and therefore perpetuates negative stereotypes of pregnant workers as being “too tired, too large, or too emotional to carry on their normal activities.” Judith G. Greenburg, *The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 245 (1998).



### III. THE EUROPEAN STANDARD

#### A. *What Is the European Approach?*

While the *Ensley-Gaines* approach provides a comparator group that is preferable to the *Troupe* line of reasoning, the workplace will not be accessible to pregnant women and the law will not provide consistent protection to pregnant employees until the courts recognize that no comparator group exists for pregnant women. This approach is consistent with the approach taken by the European Union.

Protection for pregnant European employees is established in two separate Directives by the European Council.<sup>103</sup> The earlier of the two Directives, known as the Equal Treatment Directive,<sup>104</sup> creates a general equal treatment approach to combating gender discrimination. That is, the Directive guarantees “that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.”<sup>105</sup>

Nonetheless, the European Council recognized situations in which strictly applying equal treatment to both genders will fail to eradicate gender discrimination in employment. The Directive explicitly states that equal treatment should be applied “without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities.”<sup>106</sup> Additional language of the Directive, which protects “provisions concerning the protection of women, particularly as regards pregnancy and maternity,”<sup>107</sup> indicates that the European Council acknowledges pregnancy as one situation in which equal treatment between genders would provide insufficient protection against discrimination.

A second European Council Directive—the Pregnant Workers Directive—expands the employment protections afforded to pregnant workers.<sup>108</sup> In addition

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<sup>103</sup> The European Union governs its member states through three types of regulations, one of which is directives. The objectives contained in directives are binding on the Member States, but Member States are free to implement the objectives however they wish. Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, O.J. (L 325) 33, 132, art. 249 [hereinafter *EC Treaty*]. For a more detailed explanation of the procedures and regulations governing the European Union, see JOHN FAIRHURST, *LAW OF THE EUROPEAN COMMUNITY* (Harlow 4th ed. 2003).

<sup>104</sup> Council Directive 76/207/EEC, 1976 O.J. (L 39) 40 [hereinafter *Equal Treatment Directive*].

<sup>105</sup> *Id.* at art. 5(1).

<sup>106</sup> *Id.* at art. 2(4).

<sup>107</sup> *Id.* at art. 2(3).

<sup>108</sup> Council Directive 92/85/EEC, 1992 O.J. (L 348) 1 [hereinafter *Pregnant Workers Directive*]. Interestingly, the Pregnant Workers Directive is framed by a purpose to promote the health and safety of pregnant women in the workforce, rather than an extension of the equality

to providing various technical restrictions on employers regarding the conditions of pregnant workers' employment, the Pregnant Workers Directive:

Prohibit[s] the dismissal of workers ... during the period from the beginning of their pregnancy to the end of the maternity leave ... save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent.<sup>109</sup>

The application and enforcement of both the Pregnant Workers Directive and the Equal Treatment Directive was demonstrated in subsequent cases referred to the European Court of Justice (ECJ). The most notable decision was *Webb v. EMO Air Cargo (U.K.) Ltd.*<sup>110</sup> The plaintiff, Carole Webb, was hired by the defendant to replace an employee taking maternity leave.<sup>111</sup> Shortly after accepting the position, Ms. Webb discovered that she was pregnant as well, and would require maternity leave during the period for which she had been hired.<sup>112</sup> The defendant, EMO Air Cargo, subsequently terminated Ms. Webb's employment.

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principles established in the Equal Treatment Directive. See *Pregnant Workers Directive*, at preamble (deriving the authority for the directive from "Article 118(a) of the Treaty, [which] provides that the Council shall adopt, by means of directives, minimum requirements for encouraging improvements, especially in the working environment, to protect the safety and health of workers."). This foundation slightly undercuts the nature of the directive; the preamble weakens the effectiveness of the directive further by adding a paternalistic tone and implying pregnant women are too emotionally fragile to cope with employment termination. See *Pregnant Workers Directive*, at preamble (recognizing that "[w]hereas the risk of dismissal for reasons associated with [a pregnant woman's] condition may have harmful effects on the physical and mental state of pregnant workers, workers who have recently given birth or who are breastfeeding; whereas provision should be made for such dismissal to be prohibited."). While none of this language or foundational framework has biased the courts' interpretations of the Directive, other scholars worry about the conceptual differences between the aims of equality and health and safety. See Petra Foubert, *Does EC Pregnancy and Maternity Legislation Create Equal Opportunities for Women in the EC Labor Market? The European Court of Justice's Interpretation of the EC Pregnancy Directive in Boyle and Lewen*, 8 MICH. J. GENDER & L. 219, 228-30 (2002) ("It should be considered at least problematic that the Pregnancy Directive has been adopted as a specific implementation of the Health and Safety Directive, and not a specific derogation from the Equal Treatment Directive.").

<sup>109</sup> See *Pregnant Workers Directive*, *supra* note 108, at art. 10.

<sup>110</sup> *Webb v. EMO Air Cargo (U.K.) Ltd.* 1 W.L.R. 1454 (1995).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

In accordance with European Union law, the British House of Lords submitted a question to the European Court of Justice (ECJ)<sup>113</sup> seeking clarification of EU law before reaching its own conclusion. Specifically, the House of Lords sought guidance from the ECJ on the following question:

[I]s it discrimination on grounds of sex contrary to Directive 76/207 for an employer to dismiss a female employee . . . whom he engaged for the specific purpose of replacing . . . another female employee during the latter's forthcoming maternity leave, when, very shortly after appointment, the employer discovers that the applicant herself will be absent on maternity leave during the maternity leave of the other employee . . . and the employer would similarly have dismissed a male employee engaged for this purpose who required leave of absence at the relevant time for medical or other reasons?<sup>114</sup>

The European Court of Justice replied that:

[T]here can be no question of comparing the situation of a [pregnant] woman . . . with that of a man similarly incapable for medical or other reasons. . . .

As the applicant rightly argues, *pregnancy is not in any way comparable with a pathological condition*, and even less so with unavailability for work on non-medical grounds . . . .<sup>115</sup>

The House of Lords proceeded to render an opinion consistent with the opinion of the ECJ. Unknowingly drawing a parallel to *Troupe*, Lord Keith, writing for the court, also created a "hypothetical man" to further the court's position. The opinion distinguished between a pregnant woman unavailable to work for a period of time and the hypothetical man unavailable to work for the same period of time. The fact that the woman's unavailability results from pregnancy is a "circumstance relevant to her case, being a circumstance which could not be present in the case of the hypothetical man."<sup>116</sup> In other words, because pregnancy can only occur in a woman, an adverse employment action based on any condition of pregnancy is discrimination based on sex, because a male would not (and could not) have been treated the same way.<sup>117</sup>

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<sup>113</sup> The European Court of Justice interprets both the Treaties governing the European Union, as well as any legislation created by a European Union institution. See FAIRHURST, *supra* note 103.

<sup>114</sup> *Webb v. EMO Air Cargo (U.K.) Ltd.* 1 W.L.R. 1454 (1995).

<sup>115</sup> *Id.* (emphasis added).

<sup>116</sup> *Id.*

<sup>117</sup> The opinion did not decide whether employers could lawfully terminate the employment of an employee who, because of pregnancy, is unavailable to work the entire period for which she was hired. A major factor in the House of Lord's reasoning was that Ms.

Other ECJ decisions reiterate the principle that pregnancy is unique to females, and cannot be comparable to any condition of the male gender. In *Handels-og KontorfunktionWrernes Forbund I Danmark v. Fwllsforeningen*,<sup>118</sup> the ECJ held that termination due to absences resulting from medical conditions related to pregnancy is unlawful pregnancy discrimination.<sup>119</sup> In reaching this conclusion, the court recognized that

It must next be noted that although pregnancy is not in any way comparable to a pathological condition, the fact remains that it is a period during which disorders and complications may arise compelling a woman to undergo strict medical supervision and, in some cases, to take absolute rest for all or part of her pregnancy and are thus a specific features of that condition.<sup>120</sup>

Furthermore, in *Tele Danmark A/S v. Handels-og KontorfunktionWrernes Forbund I Danmark (HK)*,<sup>121</sup> the court explicitly stated that economic loss due to the absence of pregnant employees does not justify adverse action against pregnant employees by employers.<sup>122</sup>

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Webb's employment contract established her employment for an indefinite amount of time, rather than limit it to the specific period of the former employee's maternity leave. The opinion left employers able to terminate the employment of anyone hired in a situation "namely where staff is required for some specific event such as the Wimbledon fortnight or the Olympic games." *Id.* The issue of whether employees hired for a fixed contract, and who are subsequently terminated because they are unable to fulfill the terms of that contract due to pregnancy, suffer pregnancy discrimination was later decided in two ECJ cases, Case C-109/00, *Tele Danmark A/S v. Handels-og KontorfunktionWrernes Forbund I Danmark*, 2001 E.C.R. I-06993 and Case C-439/99, *Melgar v. Ayuntamiento de Los Barrios*, 2001 E.C.R. I-06915. Both decisions held that, regardless of the length of time for which the employee was contracted, the termination of an employee (or non-renewal of an employee's contract) because of absence due to pregnancy is unlawful discrimination. *See Melgar*, E.C.R.I.-06915, at ¶ 47; *Tele Danmark*, E.C.R.I.-06993, at ¶ 34. The *Melgar* and *Tele Danmark* opinions have drawn criticism for creating substantial economic risk on the part of employers when hiring a young female for a fixed period of time. *See* David Stott, *What Price Certainty?* 27(3) E.L. REV. 351, 358 (2002) ("[T]he decisions in *Melgar* and *Tele Danmark* could well have the perverse effect of increasing the risk that women of child-bearing age will be discriminated against in the recruitment process.").

<sup>118</sup> Case C-66/96, *Handels-og KontorfunktionWrernes Forbund I Danmark v. Fwllsforeningen*, 1998 E.C.R. I-07327.

<sup>119</sup> *Id.* ¶ 35.

<sup>120</sup> *Id.* ¶ 33.

<sup>121</sup> Case C-109/00, *Tele Danmark A/S v. Handels-og KontorfunktionWrernes Forbund I Danmark (HK)*, 2001 E.C.R. I-06993.

<sup>122</sup> *Id.* ¶ 28. Most of the criticism of the Pregnant Workers Directive and the Equal Treatment Directive actually condemns the broad scope of the standard as reaching too far—risking the institutionalizing of stereotypes of pregnant women and mothers of young children. *See* Foubert, *supra* note 108. Foubert's concern lies with an ECJ decision in which the extended maternity provided to a mother, but not a father, did not violate the Equal Treatment Directive.

## B. *Why Should We Adopt the European Approach?*

The European approach to determining pregnancy discrimination should be adopted by the United States because it addresses two current needs of our inadequate legal pregnancy protection: first, the European approach recognizes the unique biological condition of pregnancy; and second, the European approach accepts the necessary costs of pregnant workers and distributes the cost among society.

European law explicitly recognizes that pregnancy is a biological condition unique to females.<sup>123</sup> The rationale behind this recognition is eloquently stated by European legal scholars Giuseppe Mancini and Siofra O'Leary, who reasoned that if a female's capacity to become pregnant "[is] at the heart of much of the less advantageous, if not downright discriminatory, treatment which women receive in the labour market, surely no Court should ignore this fact by searching for comparable situations affecting men which do not in reality exist."<sup>124</sup> Meanwhile, American courts spend countless hours and resources engaging in searches for the proper male counterpart to a pregnant woman. If a pregnant employee could satisfy her *prima facie* case of discrimination by proving the employer acted on the basis of pregnancy—without the burden of finding a comparator—courts would not be forced to make artificial distinctions and comparisons between the location and nature of accidents, illnesses, pregnancy, and injuries.<sup>125</sup> Employees and employers alike would enjoy a clear, consistent

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*See* Case 184/83, *Hofmann v. Barmer Ersatzkasse*, 7 E.C.R. 3047 (1984). By limiting maternity leave to women, Foubert argues that "the Court allowed Member States to maintain the unequal treatment of women that is entirely inspired by traditional societal ideas on how women—not men—should behave," and calls the Hofmann decision "legal acceptance of the idea that women are better placed to care for babies . . ." *See* Foubert, *supra* note 108, at 227. Foubert nonetheless recognizes a limited need for abolishing a comparative standard:

during the period needed for physical recovery after childbirth, a woman finds herself in a very unique biological situation that is incomparable to any other situation. During this relatively short period, a woman can . . . be treated differently, but only with a view to creating substantive equal opportunities for women in the labor market.

*Id.* at 245–46.

<sup>123</sup> *See supra* Part III.A.

<sup>124</sup> Siofra O'Leary & Giuseppe Federico Mancini, *The New Frontiers of Sex Equality Law in the European Union*, 24(4) E.L. REV. 331, 338 (1999).

<sup>125</sup> I should note that I am advocating only an adoption of the European approach to recognizing pregnancy discrimination, rather than the entire European legal framework for pregnancy discrimination claims. That is, the European acceptance of pregnancy as a condition unique to females should eliminate the need for a plaintiff to satisfy the "similarly situated" requirement of a *prima facie* case of pregnancy discrimination. *See supra* notes 17–27 and accompanying text. I am reserving my opinions about the remaining burdens of both the

statement of what constitutes pregnancy discrimination, and the PDA would finally fulfill its intended purpose.<sup>126</sup>

Perhaps even more important to the promotion of women in the workforce is the unequivocal acceptance of the Europeans that pregnant employees cost employers more money than nonpregnant employees and their subsequent decision to allocate that cost among all members of society. By allowing employers to justifiably terminate the employment of pregnant workers because of the costs such workers impose on employers,<sup>127</sup> the current American standard "tends to place the social cost of pregnancy . . . on those female workers who bear children."<sup>128</sup> To the extent that procreation and sustaining our population are societal goals, rather than personal or feminist goals, the costs of bearing children should not be borne solely by women.

#### IV. CONCLUSION

An examination of both American and European pregnancy discrimination law reveals that the outcome of Kimberly's situation, described in the Introduction, depends largely on her citizenship. If Kimberly is British, she likely remained employed with the department store throughout and after the completion of her pregnancy. As she accumulates seniority and experience, perhaps she will advance into a management position.

However, if Kimberly is American, there is little doubt that her morning sickness not only cost Kimberly her job, but also her income during the remainder of her pregnancy and any seniority and experience she could have accumulated—including any possibilities of promotion. If our society values both procreation and equality in employment, the costs of achieving both objectives should be equally distributed between both sexes.

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employee and the employer in pregnancy discrimination claims. Therefore, the BFOQ defense, as well as any other defenses to Title VII claims, would still be available to employers.

<sup>126</sup> See *supra* Part II.C.

<sup>127</sup> See *supra* Part II.B.

<sup>128</sup> See O'Leary & Mancini, *supra* note 124, at 340.